IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

United States of America,

Plaintiff,

vs. Case No. 05-10245-01-JTM

Sigifredo Saenz,

Defendant.

MEMORANDUM AND ORDER

Defendant Sigifredo Saenz was found guilty of one count of conspiracy to distribute methamphetamine, and three counts of distribution of methamphetamine. (Dkt. 82, 83). Following a jury trial and conviction, the court, on August 26, 2006, sentenced Saenz to 192 months imprisonment (Dkt. 108), a sentence which in itself represented a sentence 43 months below the recommended guidelines sentence of 235 months.

Saenz's conviction and sentence were affirmed by the Tenth Circuit in 2007 (Dkt. 124), and this court rejected Saenz's 2009 motion seeking to vacate his sentence under 28 U.S.C. § 2255. (Dkt. 131). Following the 2014 modification to the sentencing guidelines for drug-related offenses (Amendment 782), Saenz moved for a modification of his sentence, and the court further reduced the already low sentence by a four months, to 188 months.

(Dkt. 139).

This matter is before the court on two motions by Saenz. In the first, seeking "partial reconsideration," he asks for a further reduction, to 145 months. (Dkt. 140). In the second, Saenz asks for relief under Fed.R.Cr.Pr. 36 because of a supposed clerical error. The defendant's motions are hereby denied.

The authorities cited by defendant in his motion for reconsideration do not support the relief sought. *Feeman v. United States*, 131 S.Ct. 2685 (2011), merely holds that the court has the discretion to impose an appropriate sentence under 11 U.S.C. § 3582(c)(2), even in cases in which the parties have entered into a plea agreement under Fed.R.Cr.Pr. 11 (c)(1)(C). The court has already exercised that discretion, and has imposed a fair and appropriate sentence.

The language cited by defendant from *United States v. Bailey*, 2013 WL 4735697 (N.D. Iowa Sept. 3, 2013) explicitly acknowledged that this was not the majority rule. 2013 WL 4735697, at *4 ("[n]ot all district courts have followed the majority rule, however ..."). Indeed, the court ultimately rejected the defendant's argument of disparity in § 924(c) sentences as a basis for a downward variance, finding that it was precluded by decisions such as *United States v. Hatcher*, 501 F.3d 931 (8th Cir.2007) and *United States v. Foote*, 898 F.2d 659, 666 (8th Cir.1990) from granting the relief sought. Here, the defendant has presented no basis for concluding that the relatively lenient sentence warrants further reduction.

Saenz's Rule 36 motion relies on *United States v. Mackay*, 757 F.3d 195 (5th Cir. 2014),

where the court concluded that a clerical error in a Presentence Report (PSR) could be corrected pursuant to Rule 36. The case is inapplicable, however, because in *Mackay* all parties essentially agreed that the report indeed contained a clerical error. *Id.* at 196 (defendant pled guilty to marijuana distribution, "[b]ut the cover sheet of his [PSR] erroneously listed his offense as conspiracy to possess with intent to distribute, and distribution of, *cocaine* ..." (emphasis in *Mackay*)).

Saenz's argument is not premised on a clerical error. Rather, he disputes the truth of a fact within the PSR — whether he indeed used or possessed the firearm as the basis for a § 924(c) charge. Thus, he challenges the finding of use of the firearm on the merits, not on the basis of any supposed clerical error

Mackay itself cautioned that its ruling was quite narrow:

> Finally, we note the limits of our holding. As under Federal Rule of Civil Procedure 60(a), "[l]et it be clearly understood that Rule [36] is not a perpetual right to apply different legal rules or different factual analyses to a case. It is only mindless and mechanistic mistakes ... and no new additional legal perambulations which are reachable through" Rule 36. *See* [*In re*] *W*[*est*] *Tex. Mktg.*, 12 F.3d [497,] 505 [(5th Cir. 1994)].

12 F.3d at 505.

The Tenth Circuit has taken a similar approach. In *United States v. Butler*, 533 Fed.Appx. 867 (10th Cir. 2012), the court explicitly agreed with the government that Rule 36 was not a permissible means for a defendant to challenge to his sentence, based upon the contention that an enhancement for an earlier "walk away escape" was not a violent crime for purposes of § 924(e)(1). By that argument, the defendant "seeks a substantive,

rather than a clerical, change in his sentence," and thus the Rule 36 motion was properly denied. *Id.* at 870.

> These arguments provide Butler with no grounds for relief. As the government observes, Butler's argument amounts to a substantive attack on his sentence. Rule 36 does not empower a court to substantively modify a sentence. *United States v. Blackwell*, 81 F.3d 945, 948 n. 3 (10th Cir.1996); *see also United States v. Lonjose*, 663 F.3d 1292, 1299 n. 7 (10th Cir.2011). Nothing in the district court's imposition of sentence, including characterizing Butler as an armed career criminal, can be characterized as merely an oversight or a clerical error.

Id. (footnote omitted).

As the government correctly notes (Dkt. 142, at 3), there is no showing by the defendant that the sentence imposed was actually predicated on any enhancement for the use of a firearm. Even if such an enhancement existed, such a substantive challenge could not be raised by means of a claim of "clerical error" nearly ten years after the sentence was imposed.

IT IS ACCORDINGLY ORDERED this 26th day of October, 2015, that the defendant's Motions for Partial Reconsideration and for Correction of Clerical Error (Dkt. 140, 141) are hereby denied.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE